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No. 85-637

In The

Supreme Court of the United States

October Term, 1985

DONALD P. HODEL,
SECRETARY OF THE INTERIOR

Appellant,

v.

MARY IRVING, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE APPELLEES

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QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals erred in holding that 25 U.S.C. § 2206, as originally enacted and as amended, violates the Fifth Amendment because it does not provide for compensation to the estates of decedents for the land it declares to escheat.

PARTIES TO THE PROCEEDING

The Appellant is the Secretary of the Interior. The appellees are Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette, as guardian for Duane Cross, Miguel Cross, Hope Cross, Anthony Cross, and Faith Cross.

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BRIEF FOR THE APPELLEES

Appellees accept those portions of the Brief for the Appellant entitled Opinions Below and Jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Just Compensation Clause of the Fifth Amendment to the United States Constitution; Section 207 of the Indian Land Consolidation Act of 1983, Pub. L. No. 97-459; Tit. II, 96 Stat. 2519, 25 U.S.C. 2206; the amended version of Section 207 of the Indian Land Consolidation Act enacted in Pub. L. No. 98-608, 98 Stat. 3173, 25 U.S.C. (Supp. II) 2206; Section 11 of the Act of Mar. 2, 1889, ch. 405, 25 Stat. 891; Section 28 of the Act of Mar. 2, 1889, ch. 405, 25 Stat. 899; and Article 12 of Treaty of Fort Laramie, April 29, 1868, 15 Stat. 635 are reproduced at App., *infra,* 1a-4a.

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STATEMENT

Appellant, hereafter the government, has presented the history of the fractionated heirship problem, the statutory scheme and the proceedings in this case. Brief for the Appellant 2-16. However, the statement of this case must be supplemented to give the Court the perspective of the individual Indian decedents and their heirs and devisees.

The Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 96 Stat. 2519, 25 U.S.C. 2201 *et seq.* (hereinafter ILCA) was passed by both houses of Congress in December of 1982. It was signed into law by the President on January 12, 1983. The memorandum instructing the local BIA agencies on implementation of the

escheat provision was sent out on March 2, 1983 (J.S. App. 37a-40a) and received at the Pine Ridge Agency on March 7, 1983 (Exhibit H to Complaint). The dates of death for appellees' decedents are as follows: Chester Irving, March 18, 1983 (Jt. App. 18); Geraldine Mary Poor Bear Little Hoop Cross, March 23, 1983 (Jt. App. 21); Edgar Pumpkin Seed, June 23, 1983 (Jt. App. 29); and Charles Leroy Pumpkin Seed, April 2, 1983 (Jt. App. 34). Therefore, decedents did not have sufficient time before their death to seek any of the remedies suggested in the memorandum to avoid the escheating of their property interests. Brief for the Appellant 10, 34-35. The ILCA did not provide any grace period which would have allowed the decedents to make gift conveyances, to apply for partitionment of a tract or to purchase additional interests from co-owners to increase the size of their interest in the tract. *See: Texaco Inc. v. Short,* 454 U.S. 516 (1982) (two year grace period after effective date of statute given to file claim to retain mineral interests.)

Geraldine Mary Poor Bear Little Hoop Cross, hereafter Cross, did in fact attempt to preserve for her five minor children her trust property interests. On March 16, 1983, Cross executed a Last Will and Testament leaving all her worldly goods to her five minor children (Exhibit D to Complaint). When Cross died on March 23, 1983, she possessed a total of fifteen parcels of trust land on the Pine Ridge Reservation subject to the Section 207 of the ILCA, 25 U.S.C. 2206, hereafter the escheat provision.[1]

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[1] The following discussion does not include the trust property interests that Cross possessed on the Rosebud Reservation. (Jt. App. 26-28).

Nine parcels had an aggregate estimated value of $1,192.91. Income for the preceding year totaled $100.56 for these parcels. (Jt. App. 22-25). Further, of these nine parcels that were subject to escheat, Cross's interest, while 2% or less of the total tract, amounted to approximately 3½ acres in Allotment OS-4542 Charles Little Hoop; 2 2/3 acres in Allotment OS-5161 White Horse Owner; 3½ acres in Allotment OS-5300 Holy In Center; 1½ acres in Allotment OS-5413 Take Pity On Them; and almost 2 acres in Allotment OS-5523 Joseph Little Loop.[2] In the other six allotted tracts, Cross had reserved mineral rights only, however, no attempt was made to appraise the value of these rights. (Jt. App. 13 at paragraph 13).

The escheat provision of the ILCA, as originally enacted, required that the decedents' trust interests which represented 2% or less of the total acreage of a tract and have earned less than $100 in the year preceding their death must escheat to the tribe. These are the interests that the government labels as "de minimis." However, 3½ acres or even ½ acre is certainly large enough to place a home or a garden upon. (Jt. App. 14 at paragraph 17). It is difficult to consider 3½ acres of land as a de minimis interest, even on the plains of South Dakota.

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[2] As pointed out by the government, Cross' smallest interest was on the Rosebud Reservation. Her interest in Allotment RS-4099 Yellow Hawk, was a 1/3645th interest in 320.12 acres, earning her 35 cents in the year before her death. However, the size of this one interest does not justify the government's characterization that the escheated interests of Cross and the other decedents were "insubstantial" (Brief for the Appellant 13), when other escheated interests are 3½ acres in size or earned as much as $51.10 in the preceding year. (Jt. App. 23).

The decedents should not be penalized for the fact that these property interests were not directly used or lived upon by them. Their lack of use is due in large part to the government's administration of trust lands. The interests are undivided ones in each tract of land. Therefore, the individual decedents, like Cross, did not have a specific 3½ acres designated in the tract as their own. The individual decedents would have had to apply for the partitionment of the tract to obtain specific acreage in that tract. Contrary to the government's suggestion to the Court that partitionment is a viable remedy (Brief for the Appellant 10 and 35), a request by the decedents for partitionment would have had almost no chance of success unless all heirs to the tract consented. *See Sampson v. Andrus,* 483 F.Supp. 240 (D.S.D. 1980).

The government seeks to convince the Court that the IICA is Congress' very best effort to deal with the difficult fractionated heirship problem. However, the Brief of *Amicus Curiae* Yakima Indian Nation demonstrates that there are alternatives to the escheat provision of the IICA. The Yakima Nation since 1970 has purchased the trust interests of members and non-members not capable of inheriting them because the individuals lacked the necessary one-fourth blood quantum of the antecedent tribes and bands. These purchases were required by a Congressional amendment to the Act of August 9, 1946, ch. 933, Sec. 7, 60 Stat. 968 (codified as amended at 25 U.S.C. 607). The amendment was premised upon rectifying what Congress considered unfair: the tribe acquiring interests without compensation being paid to the individual Indians for them. See Brief of *Amicus Curiae* Yakima Indian Nation 2-3.

Congress implicitly determined, by its passage of the ILCA, that it did not intend for the government to pay compensation for the escheated property interests. Brief for the Appellant 25, f.n. 16. However, one goal of the ILCA is to reduce the administrative costs of the government in maintaining the records for fractionated heirship land. Senate Rep. 98-632, 98th Congress, 2d Session, p. 3 (1984). Therefore, it would not be unreasonable to require the government to pay compensation for the escheated interests. In fact, it would even be cost beneficial. The government, by compensating for each escheated piece of property, would be relieved of the costly administrative tasks of computing the fractional interests of the decedent's heirs and devisees.

Further, as is explained above, appellee's decedents had no fair opportunity to avoid the effects of the escheat provision. ILCA went into effect on January 12, 1983 with no grace period or meaningful notice to individuals that their individual property interests would be extinguished upon death and transferred to the tribe.

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SUMMARY OF ARGUMENT

The escheat provision of the ILCA effects a taking of vested property interests held by the individual Sioux decedents without just compensation in violation of the Fifth Amendment.

A. The Sioux decedents had vested property rights in their fractionated heirship land based upon the agreements reached and the circumstances surrounding the allotment of

the Great Reservation of the Sioux. Included in their vested property rights was the right to pass their property upon death.

The Great Reservation of the Sioux was allotted only after negotiations and agreements were reached between the federal government and the Sioux Indians, hereafter Sioux. The Act of March 2, 1889, ch. 405, 25 Stat. 888 *et seq.* only became effective upon the consent of the Sioux male population. In fact, this was the second act passed to allot the Sioux Reservation. The Act of April 30, 1888, ch. 206, 25 Stat. 94 *et seq.* lapsed after failing to gain the required approval of the Sioux. As a result of objections raised by the Sioux to the 1888 Act, material changes were placed in the 1889 Act.

Both the material changes made in the 1889 Act and the concerns expressed by the Sioux to the commissions, seeking their approval, demonstrate their concern for the future of their children and children's children and the desire to preserve a land base for them. The Sioux understood that by agreeing to the allotment and relinquishing their claim to all tribally held land, they were securing for themselves, their children and grandchildren land which could not be taken away, even by Congress. The Sioux obtained assurances from the commissions in both 1888 and 1889 that they correctly understood that their allotments would be theirs to pass upon death to their children, passing down through the generations. The Act of 1889 must be construed as the "unlettered" Sioux understood it and as "as justice and reason demand." *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 406, f.n. 2 (1968). Therefore, the Act of 1889 must be construed to include the right to pass these property interests upon death.

This right to pass property at death vested in the allottees and their successors in interest upon their relinquishment of any claim to tribal lands. The bargain of the federal government and the Sioux is materially indistinguishable from the "bargained for right" of a tax exemption found by the Court in *Choate v. Trapp*, 224 U. S. 665 (1912). In *Choate*, an agreement was first reached between the federal government and the Choctaws and Chickasaws which was later incorporated bodily into a statute. Part of the agreement there was that in consideration for their tax exempt allotments, the Choctaws and Chickasaws would relinquish their claims to tribally held lands. Therefore, the Court found that each allottee had gained a vested right in the tax exemption since the individual allottee had received his allotment only on the condition that he relinquish his interest to all tribally held property.

The Sioux negotiated with the federal government and their agreements were embodied in the Act of 1889. The Sioux allottees obtained allotments which would pass upon their death to their families and in return, they relinquished any claim to formerly tribally held lands. These allottees gained vested property rights in their allotments of a contractual nature which included the right to pass their property upon death. The Sioux decedents as successors in interest to the original Sioux allottees held this vested property right to pass their property upon death. It is this right to pass property that is extinguished by the escheat provision of the ILCA.

B. The escheat provision takes the Sioux decedents' vested property interests in violation of the Fifth Amendment to the Constitution. The result of the escheat provi-

sion is that the fractionated heirship lands held by the decedents are conveyed to the tribes upon their death. The decedents' title and control of these interests are extinguished.

1. The decedents as individual Indians are guaranteed protection for their vested property interests under the Constitution. In *Choate,* the Court defined the protection to be afforded vested property rights held by individual Indians: "to the same extent and in the same way as other residents or citizens of the United States." *Id.* at 677. Therefore the decedents' vested property interests are protected by the Fifth Amendment to the Constitution. The Fifth Amendment forbids the taking of private property for a public use without paying just compensation. Here, the decedents upon death had their property interests extinguished and conveyed to the tribes under the dictates of the escheat provision of the ILCA. The right of the Sioux to pass their property upon death was "taken". The contractual nature of this right puts it outside of Congress' usual authority to regulate the descent and distribution of Indian property and insures it Fifth Amendment protection.

2. The escheat provision does not regulate the decedents' property interests, it takes them. This provision extinguishes these individually held property interests upon the decedents' death.

The government tries to squeeze the facts here into the context of regulatory taking cases, such as *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978) and *Andrus v. Allard,* 444 U.S. 51 (1979). However, the facts here are not analogous to these regulatory taking

cases. In *Allard,* the owners of protected bird parts were deprived only of their right to sell these parts. The owners retained possession, use and the ability to devise their bird parts. In *Penn Central,* the owner of Grand Central Terminal was restricted only from building a multistory structure on the terminal. Here, the Sioux decedents completely lose their property interests. This is not regulation, but the taking of an interest.

Even if a regulatory taking analysis is applied to the facts here, the nature of the government's action in the escheat provision "chops through the bundle [of property rights], taking a slice of every strand." *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 435 (1982). Thus there is a taking even under a regulatory analysis. The escheat provision must be recognized as a taking, otherwise there will be nothing to prevent Congress from increasing the size of the interests to escheat and threatening the extinction of property interests held by individual Indians.

C. That Congress sought to fulfill public purposes with the escheat provision is conceded. Though it is not conceded that the public purposes will be accomplished by this provision.

D. Finally, it is clear from the face of the ILCA, as originally enacted and amended, that no compensation is paid for the interests escheating to the tribes. Congress has attempted to rectify the problems created by its allotment policy. However, its solution will further penalize the real victims of the allotment policy, the Indian people, by taking their property interests without paying just compensation. This violates the Fifth Amendment.

ARGUMENT

I. THE ESCHEAT PROVISION OF THE INDIAN LAND CONSOLIDATION ACT OF 1983, AS ENACTED AND AS AMENDED, DOES EFFECT A TAKING OF PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT.

In deciding this case the Court is required to look sequentially at four questions. *Ruckelshaus v. Monstanto Co.*, —U.S.—, 104 S.Ct. 2862, 2872 (1984). The first inquiry is whether or not decedents had a vested property interest in their undivided fractional interests of allotted land. The Sioux decedents did have such a property interest based upon the circumstances and nature of the agreement between the Sioux and the federal government embodied in the Act of March 2, 1889, ch. 405, 25 Stat. 888 *et seq.* That vested property interest included the right to pass property upon death.

Upon finding a protected property interest the next inquiry is whether or not the escheat provision of the ILCA has "taken" these protected property interests by transferring them to the Oglala Sioux and Rosebud Sioux Tribes. The holding of *Choate v. Trapp*, 224 U.S. 665 (1912) is controlling precedent that there has been a Fifth Amendment taking here. Further the escheat provision is not the "carefully tailored regulatory measure" portrayed by the government. Brief for the Appellant 28.

When there is a taking, the next inquiry is whether or not the taking was for a public use. Appellees concede that there are valid public purposes behind the escheat

provision of ILCA: to consolidate Indian lands and reduce the costs of the government in administering these fractional interests.

The final inquiry is whether or not there is just compensation paid for the protected property interests that escheat to the Oglala Sioux and Rosebud Sioux Tribes. From the face of the statute, as enacted, it is clear that there is no provision for compensation to the individual Indian's estate for the interests that escheat to the tribe. This is equally true under the escheat provision, as amended, if an individual Indian dies intestate or does not devise his escheatable interests to the owner of another fractional interest in the same tract.

The application of *Ruckelshaus* to the facts of this case leads to one conclusion: the escheat provision of the ILCA, as originally enacted and as amended, violates the Fifth Amendment by taking decedents' right to pass property upon death without compensation.

A. The Decedents Held Vested Property Interests Under the Act of March 2, 1889, Which Included Right to Pass Their Property Upon Death.

The court of appeals correctly held that the Sioux decedents, as successors in interest to the original Sioux allottees, had a vested property right to pass their property upon death. (J.S. App. 16a). The court of appeals held that the appellees as potential heirs and devisees had no vested rights in the fractionated trust land at issue here. (J.S. App. 12a) Appellees were, however, granted standing to raise their decedents' claim of a Fifth Amend-

ment taking.[3] (J.S. App. 13a-15a). The court of appeals found that the statute allotting the Sioux was in the nature of a "bargain" under which the individual Sioux allottee (and his successors in interests) obtained the right to pass his interest in his allotment at death to "his children", and "children's children" in return for the allottee's relinquishment of all claims to lands formerly held in common as tribal property.[4] (J.S. App. 16a) This finding of a vested property interest is firmly grounded on the historical circumstances surrounding the allotment of the Great Reservation of the Sioux Nation. Further, the court of appeals' construction of the statute allotting the Sioux is in accord with sound canons of construction developed by this Court.

The Act of March 2, 1889, declared that the Great Reservation of the Sioux Nation, comprising most of what

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[3] The court of appeals was correct in finding that the appellees have standing to bring this lawsuit. Clearly, the decedents do not have the ability to assert their own right in their fractionated heirship land. The escheat provision operates only upon the owners' death, thus depriving the owners of the opportunity to challenge it during their lifetime. Such a deprivation allows the Court to abandon the normal rule of practice that "one may not claim standing . . . to vindicate the constitutional rights of some third party." *Barrows v. Jackson,* 346 U.S. 249, 255 (1953). Further, the relationship of appellees, as heirs and devisees, to the decedents is adversely affected by the escheat of these property interests. *See Singleton v. Wulff,* 428 U.S. 106, 114-116 (1976). The appellees on appeal seek only to establish the vested property interest of their decedents.

[4] The "bargain" with the Sioux is distinguishable from the situation of tribes who were allotted under the provisions of the General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.* Those tribes did not negotiate or consent to the allotment of their lands. *See* Brief *Amicus Curiae* of the Sisseton-Wahpeton Sioux Tribe p. 2.

is now South Dakota, west of the Missouri, would be allotted to individual Sioux (§ 8, 25 Stat. 890). The Act also provided for the release of Indian title (§ 16, 25 Stat. 893) and all surplus lands to be opened to non-Indian settlers (§ 12, 25 Stat. 892). However, the Act would only be implemented if accepted and consented to by three-fourths of the adult male Indian population as prescribed by the twelfth article of Treaty of Fort Laramie, April 29, 1868, 15 Stat. 635. (§ 28, 25 Stat. 899, App. 3a).

The circumstances surrounding the approval of the 1889 Act are relevant in determining the meaning of the Act's words. *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 87 (1918). A commission was sent to the Great Reservation of the Sioux Nation to obtain the required approval of the adult male population in 1889. This was the second such commission sent to meet with the Sioux. The first one unsuccessfully sought approval of the Act of April 30, 1888, ch. 206, 25 Stat. 94 *et seq.* which also provided for the allotment of the Sioux. Because the approval of three-fourths of the adult male population was not obtained, the Act of April 30, 1888, was rendered null and void by its own terms. (§ 24, 25 Stat. 104).

In the 1888 commission report, two of the major objections to the 1888 Act raised by the Sioux were whether there would be sufficient land for their children and a fear that the federal government was not acting fairly with this legislation, since it had not been fair in its past dealing with the Sioux. Senate Exec. Doc. No. 17, 50th Congress, 2d Session, at 6-7 (1889). The Sioux's objection to allotments of 160 acres for a head of family in the

1888 Act resulted in doubling the size of allotment for that group in the 1889 Act.[5] This increase was obviously designed to address the Sioux's concern that there be sufficient land for their children. The Sioux also obtained increased revenues in the 1889 Act which specifically increased the funds available to educate and train their children. The increased price per acre of surplus lands provided for in 1889 Act (§ 21, 25 Stat. 896) increased revenues of the permanent fund created by that Act.[6] Half of that fund was designated for "promotion of industrial and other suitable education". (§ 17, 25 Stat. 895). It is rational to assume the result of a larger fund would be increased education and self-sufficiency for allottees, their children and children's children. Ultimately, the Sioux sought to insure the preservation of a land base for future generations.[7]

The Sioux were given explicit assurances by the 1889 commission that their rights to their allotments would not

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[5] This was also double the amount of acreage received by heads of household under the General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq*.

[6] The permanent fund was also increased from one million dollars in the proposed 1888 Act (§ 17, 25 Stat. 101) to three million dollars in the approved 1889 Act. (§ 17, 25 Stat. 895).

[7] At a council meeting held at the Standing Rock Agency with the 1888 commission Call stated:

> "I do not want to consider the sale of this land only with a view to one generation. There are lots of children here growing up and I want to retain the land for them."

S.Exec. Doc. 17, *supra*, at 108.

diminish.[8] These assurances are significant given the Sioux's misgivings about the fairness of the federal government's past dealings.

General Crook:

> "The great trouble with the other treaties was that they did not give the Indians patents for their land, and now this treaty gives you papers for your land, that nobody can take away from you. [Applause.] Your taking a patent for it takes it out of Congress, and they can't make any change in it."
>
> Senate Exec. Doc. No. 51, 51st Congress, 1st Session, at 54 (At the Rosebud Agency, Dakota, June 7, 1889).

Bear Nose:

> "My understanding is with the Commissioners, and when you take this back to the Great Father, and we have agreed to let you have this you have

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[8] Similar assurances had been given to the Sioux by the 1888 commission which was unsuccessful in acquiring the approval required by the Act of 1888:

Major Anderson:

> "I want to give you an illustration of the relative proportion of land you will have after disposing of that part asked for in the bill. Here is a 2-foot rule with four equal divisions on it. That division represents the land that has already been taken and for which you have certificates. You will have three other parts left to give to your children and grandchildren and great-grandchildren and for pasture if you want it, and you will be separate from all other people and they will have no right to dispose of any part of the remainder. You will have this land fixed to you *forever.*" (Emphasis added) Sen.Exec. Doc. 17, *supra,* at 145 (At the Crow Creek Agency, Dakota, August 30, 1888).

> spoken for, and we take our land in severalty, nobody can come up and take our land away from us. That is my understanding."
>
> General Crook:
>
> "That is right."
>
> S.Exec. Doc. No. 51, *supra,* at 111 (At the Pine Ridge Agency, Dakota, June 21, 1889).

These entries reflect the Sioux's understanding that upon death they could pass their allotments to their families without the fear that anyone, even the federal government, would take them away.[9] Based on the commissioners' assurances to the Sioux that this understanding was correct, the Sioux accepted and consented to the allotment of their lands and the relinquishment of claim to tribal lands. Only then did the Act of March 2, 1889 become law.[10]

Congress eventually passed the Act of June 25, 1910, ch. 421, § 2, 36 Stat. 855 (codified as amended at 25 U.S.C. § 373 (1983)). With this Act, Congress "sought to fill gaps and deficiencies in the administration of estates of

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[9] There was some discussion of Congress' power of eminent domain, to take land "no matter to whom it belongs, provided they pay the owners for its use or taking it. . ." Agent Galligher of Pine Ridge Agency. S.Exec. Doc. No. 51, *supra,* at 70. However, this action was compared to the taking of an individual white man's land taken for the needs of the government for which compensation of a fair price was paid. Governor Foster. S.Exec. Doc. 51, *supra,* at 76.

[10] "The deed submitted herewith is executed and signed by 4,463 being over ¾s of the adult male Indians occupying or interested in the Great Sioux Reservation; the whole number being 5,678." Letter from Secretary of Interior John W. Noble, January 30, 1890 to President Benjamin Harrison. S.Exec. Doc. 51, *supra,* p. 8.

allottees", F.Cohen, *Handbook of Federal Indian Law*, 134 (1982 ed.), by expressly stating that allottees have the right to pass their interests by will. It is reasonable to conclude that the ability to will property specified in the Act of 1910 was a part of the original 1889 bargain between the Sioux and federal government.[11] The Sioux were told that they would hold these allotments according to the laws of the white man and in 1889 the laws provided a white man with the right to make a will.

It is true that the right to pass gained by the allottees and their successors in interest under the Act of March 2, 1889, has been tempered by certain later restrictions.[12] Brief for the Appellant 18, f.n. 18. However, the right to pass their interest has always remained intact.[13] The

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[11] In fact one entry in the 1888 Commission report alludes to the Sioux's ability to make a will.

Rev. Cleveland:

> "And at any time afterwards, when you die, your land will go to your children. And if you do not *tell before you die how you want your land to be divided* among your children, then it will be divided among them according to the white man's law." (Emphasis added) S.Exec. Doc. 17, *supra*, at 139 (At the Crow Creek Agency, Dakota, August 29, 1888).

[12] These restrictions more closely resemble the regulatory taking described by the government, (Brief of Appellant pp. 28-36) than does the escheat provision of the ILCA which *extinguishes* the Indian decedent's property interest at death.

[13] The right of decedent to pass property also remained intact in *Jefferson v. Fink*, 247 U.S. 288 (1918). In *Jefferson*, the heirs of the decedent were attempting to claim a vested property right in having the decedent's estate pass to them by Arkansas law. The property of the decedent did pass, but under Oklahoma law.

allotted interests have remained with the Sioux decedents' families and have remained individually held property.

A contrary result occurs under the escheat provision of the ILCA which extinguishes the Sioux decedent's interest in his fractionated property interest upon death. The ILCA effectively converts the decedent's interest from a fee interest to a life estate.[14] This result was not contemplated by the Sioux when they consented to allotment under the Act of March 2, 1889. *See supra,* pp. 15-17.

The escheat provision of the ILCA is an attempt by Congress to rectify its failed allotment policy which has created an administrative nightmare for the BIA and has restricted the use of this land by the allottees and their successors, here the decedents. But the escheat provision is a plan which is unfair to the decedents with small interests. These decedents are not only hampered during their lifetime in the enjoyment of their interests by their undivided status (*See supra,* p. 5), but when they die the government takes their interests completely, with no compensation to their estates, which means no compensation to their heirs and devisees. This is exactly the type of situation the Sioux feared would happen when they refused to ratify the Act of April 30, 1888 and what they thought they were protected against by the Act of March 2, 1889.

The Sioux allotment, reflected in the Act of 1889, is based on a bargain between the Sioux and the federal gov-

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[14] 'The right of the Indians to the occupancy of the land pledged to them may be one of occupancy only, but it is "as sacred as that of the United States to the fee." ' (Cites omitted). *Shoshone Tribe of Indians v. United States,* 299 U.S. 476, 497-498 (1937).

ernment. The Sioux agreed to release their common claims to tribal lands and the federal government agreed to give the Sioux allotments in severalty. It was mutually agreed between the parties that one of the characteristics of the individual property interest was that it would endure and pass to the owner's children or family members. It is this vested right that the escheat provision of the ILCA took when it extinguished the Sioux decedents' interests in their fractionated heirship land.

The court of appeals recognized the bargain between the federal government and the Sioux as indistinguishable from the "bargained for right" of a tax exemption in *Choate v. Trapp*, 224 U.S. 665 (1912). In *Choate*, Choctaws and the Chickasaws entered into the Akota Agreement with the Dawes Commission. That Agreement was then embodied in the Curtis Act of June 28, 1898, ch. 517, 30 Stat. at 505. Under that agreement, each tribal member was to receive an allotment which was to be non-taxable for a limited period of time. As consideration for the allotment, each tribal member relinquished his interest in all commonly held tribal property. The situation in *Choate* is materially indistinguishable from the situation in the present case.[15]

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[15] In the case of the Sioux, the Act of April 30, 1888 was passed; a commission took the Act to the Sioux for approval; approval was not obtained; material changes were made in the Act of March 2, 1889 to address objections of the Sioux; a commission took the Act of 1889 to the Sioux, and over three-fourths of the adult male Indians occupying or interested in the Great Sioux Reservation agreed to the Act and executed a deed implementing the Act of March 2, 1889. The Sioux received allotments and in return relinquished all claim to the tribally held lands.

The Sioux by their consent to allotment and relinquishment of claim to tribally held land gave consideration for the individual allotments each member received. The agreement between the Sioux and the federal government was in the form of a contract with consideration given by both sides. The agreement gave the Sioux contractual rights which are legally enforceable against the government here. Based upon the reasoning in *Choate,* the original allottees and their successors, the decedents here, obtained vested rights in their individually held allotments. One of those rights vested in the Sioux with allotment was the right to pass their allotments upon death.

The court of appeals recognized the "bargained for" nature of the vested property rights in *Choate:* "that each allottee had gained a vested right . . . because his patent was issued only on the condition that he relinquish all claims to former commonly held Indian tribal property." (J.S. App. 15a). Then the court of appeals correctly applied the logic of *Choate* in holding that the Sioux obtained under the Act of March 2, 1889, vested rights including the right to pass property acquired by allotment upon death. The Indian decedents here had a vested right to pass property upon their death based upon the reasoning of *Choate* and the circumstances surrounding the enactment and approval of the Act of March 2, 1889.

The government argues that the word "heirs", found in Section 11 of the 1889 Act (25 Stat. 891) must be interpreted in a technical, legalistic way and that such an interpretation defeats the vested property interests of the decedents to pass their property upon death. The proper ap-

proach is to look "to the substance of the right, without regard to technical rules". *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 406, f.n. 2 (1968). The Sioux were told and understood that the language of Section 11 (App. 2a-3a) meant their property interest in allotment would pass to their families, *i.e.* when they died a member of their family would then own the land and have the right to pass it on at the time of death. They were told their allotted interests would stay in their family.

General Crook:

> "There is only one way to do that and that is to take your land in severalty and have it surveyed and get a deed for it. When you get a deed for your land nobody can take it away from you and your children afterwards. As long as you keep it in common as you do now you are liable to be legislated out of it just as you have been in the past. And those who have children and care for them should think well of this before you decide what you will do."
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> S.Exec. Doc. No. 51, *supra,* at 85 (At Pine Ridge Agency, Dakota, June 17. 1889).

The Sioux would not have attached significance to the distinction between "heirs at law" as compared to "heirs testamentary" nor appreciated the word "descent" as a term of art designating intestate succession. The Act of 1889 must be construed as the "unlettered" Sioux understood it and "as justice and reason demand." *Menominee Tribe, supra.*[16] The assurances made by the 1889 Com-

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[16] F.Cohen, *supra,* at 224, f.n. 60 (1982 ed.). "That rule would logically apply to agreements, which like treaties are bilateral transactions, but would not seem to apply to executive orders

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missioners are relevant to the Sioux's understanding of the 1889 Act and that understanding must control the construction given the Act of 1889. *Menominee Tribe.* A proper construction of Section 11 of the 1889 Act is that the Sioux were given the right to pass their property interests gained by allotment upon their death to their families.

The government also argues that the rights acquired under the Act of 1889 are not of a contractual nature and therefore not vested property rights. First, the government seems to urge that *Choate* is not applicable because the tax exemption granted to the Choctaws and Chickasaws was for a limited period of time. Brief for the Appellant 38. That the right created by the bargain in *Choate* is of limited duration does not mean *Choate* is inapplicable to the bargain of the Sioux. The relevance of *Choate* is that the allottees, individual owners of allotted lands, possessed a vested property right to the tax exemption as a result of a bargain. It is not the details of the bargain that determine *Choate's* relevance or applicability to this case. Further, the fact that in *Choate* the specific language of the Curtis Act confers the tax exemption and the 1889 Act does not specifically mention the right to pass these property interests, does not defeat Appellee's claim that the right to pass property was a vested right under the Act of March 2, 1889. *See supra,* pp. 15-17. The Sioux bargained

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and statutes, neither of which directly involve negotiations with the tribes."

E.g. Carpenter v. Shaw, 280 U.S. 363 (1930); *Marlin v. Lewallen,* 276 U.S. 58 (1928); *Starr v. Long Jim,* 227 U.S. 613 (1913); and *Choate v. Trapp,* 224 U.S. 665 (1912) where this rule was applied to statutes based upon Indian consent.

for and understood that the property interests gained in allotment would pass upon death to their families.

The government next cites *National Railroad Passenger Corp. v. Atchison, T.&S.F. Ry.*, — U.S. —, 105 S.Ct. 1441 (1985) in urging that the Act of March 2, 1889, confers no contractual rights upon the Sioux. Brief for the Appellant 39. The Sioux decedents' rights arise from a very different setting from that under review in *National Railroad*. Congress had long regulated the railroads and there is no discussion of negotiations, agreements or required consent in regard to the disputed legislation in *National Railroad*. Further, it is important to note that *National Railroad* recognizes the need to look beyond the language of the statute to the circumstances of the enactment. *Id.* at 1453.

The government argues that the Act of March 2, 1889 simply declares a policy to be pursued until Congress ordains another policy. However, to view the 1889 Act allotting the Sioux as a mere policy statement ignores the negotiated agreements between the Sioux and federal government and that the Act became effective only after it was approved by three-fourths of the Sioux males.

The government is asking the Court to view the Sioux allotment process with tunnel vision. That is certainly not appropriate when construing agreements between the federal government and Indians embodied in legislation. *Menominee Tribe, Alaska Pacific Fisheries.* The bargaining process between the Sioux and the federal government vested rights of a contractual nature in the Sioux, including the right to pass property upon death.

B. The Decedents' Vested Property Interests Have Been Taken in Violation of the Fifth Amendment.

1. The Decedents as Individual Indians with Vested Property Interests Were Guaranteed Protection for These Property Interests Under the Fifth Amendment.

The decision by the Court in *Choate* is also important because it defines the protection to be afforded vested property rights held by individual Indians:

> There have been comparatively few cases which discuss the legislative power over private property held by Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent in the same way as other residents or citizens of the United States.

Id. at 677.

The court of appeals correctly found under *Choate* that the decedents' vested property interests were protected by the Fifth Amendment to the Constitution. As a consequence, the court of appeals held the escheat provision of the ILCA unconstitutional because it takes the decedents' property without compensation. (J.S. App. 16a-17a). This holding is consistent with *Choate* which states that:

> Under the provisions of the 5th Amendment there was no more power to deprive him of the exemption than of any other right in the property. No statute would have been valid which reduced *his fee to a life estate or attempted to take from him 10 acres,* or 50 acres, or the timber growing on the land . . . It is con-

> ceded that no right which was actually conferred upon the Indians can be arbitrarily abrogated by statute.

Id. at 674. (Emphasis added).[17]

The decision of the court of appeals rests squarely upon *Choate* which has been consistently adhered to by both lower federal courts and the Court.[18] In short, Indian allottees and their successors in interest have judicially established constitutionally protected property rights in individually owned allotments. This has been consistently reiterated and entrenched in the decisions of the Court so much so that no legitimate challenge may now be raised.

The government fails to appreciate the distinctions between an individual Indian's property and tribal property and the distinctions between personal status and prop-

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[17] *Choate* refutes the argument of the government based upon *Andrus v. Allard*, 444 U.S. 51 (1979). Brief for the Appellant 34-35. The government argues that the denial of one traditional property right out of a full "bundle" of property rights may not always amount to a taking. However, the "strand" that the escheat provision takes is the right to pass the property upon death. This converts the decedents' property from a fee interest to a life estate in violation of the Fifth Amendment under the explicit language of *Choate*. The decedents' title to and control over their property interests was extinguished upon their death.

[18] *E.g. Mott v. United States*, 283 U.S. 747, 752 (1931); *Carpenter v. Shaw*, 280 U.S. 363, 366 (1930); *Morrow v. United States*, 243 F. 854, 856 (8th Cir. 1917); *Bryan County, Oklahoma v. United States*, 123 F.2d 782 (10th Cir. 1941); and *United States v. Nez Perce County*, 95 F.2d 232, 235 (9th Cir. 1938).

erty rights.[19] These distinctions are crucial to this case which is solely concerned with individually held property. Congress' broad powers to re-allocate Indian property as it affects property held by individual Indians are limited by the Fifth Amendment. *Gritts v. Fisher*, 224 U.S. 640 (1912), considered during the same term as *Choate* and decided on the same day as *Choate*, held that individual Indians have no vested rights in tribal property. At the same time, the Court in *Gritts* expressly disclaimed any authority in Congress to re-allocate individual Indian property in light of *Choate*.

Choate and *Gritts* established that Congress may not indiscriminately exercise control over reservation lands. Rather, the extent to which Congress may exercise control over such lands depends upon the type of ownership of the land. Congress may re-allocate benefits of tribal land as it sees fit.[20] But as to individual property, such as the property at issue here, Congress may only manage

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[19] *See* Brief for the Appellant 24-25. In *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911), it was held that the restraint on alienation was an attribute of the Indian's wardship. Thus, it related to his person status not a property right, a conclusion expressly noted by the Court in *Choate*. "Nothing that was said in *Tiger* . . . is opposed to the same conclusion here. For that case did not involve property rights. . . ." *Id.* at 678. In *United States v. Kagama*, 118 U.S. 375 (1886), the power of Congress is established to regulate the personal conduct of Indian people by federal criminal prosecutions.

The remaining cases cited by the government deal with tribal land, not individually owned land, and fall under the *Gritts* rule, *infra*.

[20] *E.g. Gritts; United States v. Jim*, 409 U.S. 80, *reh. den.*, 409 U.S. 1118 (1972); and *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976).

it, subject to the constitutionally protected property rights of individual owners.

The government also fails to recognize the contractual nature of the rights acquired by the Sioux through allotment. Rights arising from "valid contracts are property . . . Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch v. United States,* 292 U.S. 571, 579 (1934), *United States Trust Co. of New York v. New Jersey,* 431 U.S. 1, 19, f.n. 16 (1977). The contractual nature of the right to pass property upon death held by the Sioux decedents, there, places this right outside of Congress' usual authority to regulate the descent and distribution of interests in Indian property. *See* Brief for the Appellant 24-28.

The plenary powers of Congress authorize it to pass legislation to address the fractionated heirship problem. Brief for the Appellant 2-9. Such legislation must "be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73, 85 (1977). But these broad plenary powers are specifically limited to protect the constitutional rights of individual Indians. The Court in *Choate* specifically addressed this issue and found:

> [t]here was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which have been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the 5th Amendment.

Id. at 678.

The individual decedents each had vested property interests in allotted land subject to escheat under the defi-

nitions of the ILCA. (*See* Jt. App. 18-39) Upon death, each individual decedent's interests in these parcels were conveyed to the Oglala Sioux or Rosebud Sioux Tribes pursuant to the escheat provision of the ILCA. The individual decedents suffered a "taking" within the meaning of the Fifth Amendment.

2. The Escheat Provision Is Not A "Carefully Tailored Regulatory Measure".

The government misdirects the Court's attention when it urges that the Court focus only on the "narrow category of de minimis interests in property" in determining whether the escheat provision of the ILCA violates the Fifth Amendment. Brief for the Appellant 29. The Court has held that the size of the interest taken is not a determinative consideration in the analysis of whether or not there has been a Fifth Amendment taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-7 (1982). In *Loretto,* the Court found a Fifth Amendment taking where a cable TV company's cable and installations on landlord's building occupied about one and a half cubic feet. Here, the property interests are considerably larger than one and a half cubic feet; for example, decedent Cross had two interests each approximately 3½ acres in size.

The Court has also rejected the suggestion that a secured party with less than a fee simple interest has an insubstantial interest. While a smaller "bundle of rights" obviously accrues, it does not make the interest "something less than property." *United States v. Security Industrial Bank*, 459 U.S. 73, 76 (1982). The size of the interest is relevant to the amount of compensation due, not

to whether there is unconstitutional deprivation of private property. *Loretto.*

The government also misdirects the Court by squeezing the facts of this case into the regulatory taking analysis under *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978) and *Andrus v. Allard*, 444 U.S. 51 (1979). The escheat provision does not merely regulate the use of these property interests. It effects a total forfeiture.

The government analogizes the decedents' loss of the right to pass property upon death to the loss suffered by the owners in *Allard.* There the property interests which were the subject of the litigation were parts of protected birds. The Court found in *Allard* that a regulation prohibiting the sale of these bird parts did not run afoul of the Fifth Amendment. The Court held that the restrictions on sale did not constitute a taking since the owners could still retain, donate or devise their property. *Id.* at 66-68.

The strand in the bundle of property rights held by the Sioux decedents and taken by the escheat provision of the ILCA is the right to pass the property upon death. Because the result of taking this "strand" is to extinguish the property interests of the decedents, *Allard* is distinguishable. In *Allard,* the bird parts remained in the owner's possession. There was a limitation imposed upon what use the owner could make of these bird parts, but he was not deprived of them or all beneficial use of them.[21]

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[21] Similarly in *Penn Central,* the owner was not deprived of its ownership of the Grand Central Terminal. Rather the use of this property was regulated preventing the construction of a multistory structure on top of the terminal.

See Loretto, 458 U.S. at 433, f.n. 10. Here, Sioux decedents upon death completely lose their property interests. The rules of law developed to address governmental action resulting in the permanent physical deprivation or the destruction of all beneficial use of property are applicable to the decedents' deprivation rather than *Allard*.

Where there has been a permanent physical occupation of property, the Court has consistently "found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto*, 458 U.S. at 434-35. Here, upon the death of the decedents, the Oglala Sioux Tribe and the Rosebud Sioux Tribe obtain permanent control and physical occupation of decedents' fractionated property interests.

It is not fatal to the "taking" inquiry, as the government implies (Brief for the Appellant 31), that the tribes rather than the government receive the property interests that escheat. While the "classical taking" is by the government for its own use, the cases of the Court show that a taking can be found where the government's action results in the property interest going to a third party. *Security Industrial Bank* (benefit of federal bankruptcy law goes to individual debtors). *See also: Loretto* (benefit of city regulation flows to cable TV company) and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (benefit of state enactment to private landowners). It is clear here that government action by federal statute, the ILCA, has caused the decedents' property interests to be extinguished, by granting the permanent occupation and control of those property interests to the tribes. This

is a taking under the Fifth Amendment requiring compensation. *Loretto.*

Even if the extinguishment of the Sioux decedents' property interests at death does not fit exactly the Court's permanent physical occupation analyses, the regulation of these interests under the escheat provision of ILCA amounts to a taking. The "nature of the government action" here requires finding a "taking" has occurred irrespective of either economic impact or interference with investment back expectations. *Penn Central,* 438 U.S. at 124. The nature of the governmental action can be controlling where "it chops through the bundle [of property rights], taking a slice of every strand." *Loretto,* 458 U.S. at 435. The result of the escheat provision is the extinguishment of a property interest which takes away every strand in the bundle of rights an owner acquires with property. This is a taking even under a regulatory taking analysis.

As a general principle, the Court has recognized that regulation can effect a Fifth Amendment taking. *Kaiser Aetna v. U.S.,* 444 U.S. 164, 178 (1979); *Mahon.* In determining that a regulation amounted to a taking, the Court recognized as a fundamental attribute of ownership, the "right to exclude" *Kaiser,* 444 U.S. at 179-180. The right to pass property upon death is a similar fundamental attribute of ownership. Just as in *Kaiser* the Court protected the property owners from the temporary invasion of their dredged pond, the Sioux decedents should be protected from having their property interests permanently invaded upon death. The invasion in this case is limited to a specific time frame, *i.e.* after death, but that invasion

is no less onerous than a temporary invasion of a pond. Also the Court considered expectations of the landowners in *Kaiser,* and it is appropriate to consider the Sioux decedents' established expectations to pass their property upon death here. *See supra* pp. 15-17. The "carefully tailored regulatory measure" here regulates individually held property out of existence and should be recognized as a taking under the Fifth Amendment.

The government also urges that the escheat provision of the ILCA is "rationally tied to the fulfillment of Congress' unique obligation toward the Indians." Brief for the Appellant 17. However, determining if an enactment is "rational" is quite a separate inquiry from whether it takes property in violation of the Fifth Amendment. *Security Industrial Bank.* It is clear under the holding of *Choate,* that property held by individual Indians is protected by the Fifth Amendment from Congress' enactments. Whether the escheat provision is a rational use of Congress' legislative powers is more appropriately addressed when considering if the provisions has a valid public purpose. It is not germane to determining if there has been a taking of the Sioux decedents' property interests. The words of Justice Holmes in *Mahon* ring particularly true when considering the escheat provision of the ILCA.

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.
>
> . . .
>
> When this seemingly absolute protection is found to be qualified by police power, the natural tendency of human nature is to extend the qualification more

> and more until at last private property *disappears*. But that cannot be accomplished in this way under the Constitution of the United States. (Emphasis added).

Mahon, 260 U.S. at 415.

The government urges that the escheat provision should be examined only in the narrow context of de minimis land interests, *i.e.* interests representing 2% or less of the total acreage of the tract and having earned less than $100 in the year prior to death or under the amended value provisions effective October 30, 1984. However, even in this narrow context, these individual property interests are *disappearing*. The government stresses that there is no "blanket prohibition against the passing of all interests in trust or restricted allotment to private individuals by intestacy or devise". Brief for the Appellant 29. But, if this provision is not recognized as the taking it is, then there is no safeguard to prevent Congress from increasing the percentage of the interest in the tract from 2% to 5% to even 100%.

C. The Escheat Provision Was Intended to Be a Taking For a "Public Purpose."

Appellees do not agree with the method chosen by Congress, the escheat provision, to alleviate administrative costs and consolidate land holdings. Nor are they convinced that they will benefit by Congress' scheme.[22]

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[22] Neither was the district court convinced of any benefit to individual tribal members as a result of the ILCA:

> The argument that this result will benefit the Indian population as a whole is simply not valid in this Court's

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See Brief for the Appellant 18-19 discussing "reciprocity of advantage." However, the proper inquiry before the Court is not whether the legislation under scrutiny will in fact accomplish its stated goals. The Court's review is "limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective." *Ruckleshaus*, 104 S.Ct. at 2880, f.n. 18.[23]

The government has given the Court an excellent summary of the historical background of the fractionated heirship problem. Brief for the Appellant 2-9. Appellees concede that a public purpose was envisioned by Congress in consolidating these fractionated interests and reducing the administrative costs of the government.[24] However, the result of the escheat provision is the conversion of individually held private property to public use for the greater good of the public. Thus, the taking here is for a public use.

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> experience. The benefits derived from these lands do not filter down to the vast majority of the Indian people on the Pine Ridge Indian Reservation. In this respect the system is not functioning as contemplated. Congress would be well-advised to examine closely the practical effect of legislation such as 25 U.S.C. § 2206. (J.S. 25a, f.n. 2.).

[23] The court of appeals did not even reach "the further question of whether the taking was for a public purpose" in light of its finding that there was a taking without compensation in violation of the Fifth Amendment. (J.S. 17a.)

[24] Appellees do not concede that these public purposes will be accomplished by the escheat provision of the ILCA nor did Judge Andrew Bogue of the United States District Court, District of South Dakota. See f.n. 22.

D. The Escheat Provision Fails to Provide Just Compensation in Violation of the Fifth Amendment.

The original escheat provision of the ILCA provided that interests representing 2 per centum or less of a tract of land and earning less than $100 during the year prior to the decedent's death "shall" escheat to the tribe. (App. 1a) The statute on its face does not provide compensation for these escheating interests. Further, the legislative history makes it clear that there was no intention to pay just compensation. Brief for the Appellant 25 f.n. 16. Plainly, Congress was interested in incurring no further cost. This is so even though the federal government would derive direct benefit. Brief for the Appellant 5. The elimination of these fractionated interests will decrease the administrative costs of the government due to the fractionated heirship problem in the following ways: (1) decreasing the number of recordings required to maintain official land records; (2) decreasing the examinations of probate proceedings to determine current title status; and (3) decreasing the computation of large common fractions in determining ownership of these fractionated interests. S.Rep. 98-632, 98th Cong., 2d Sess. p. 3 (1984).

Appellees urge that it was Congress' allotment policy that caused the fractionated heirship problem. It is only fair that Congress, in its attempt to rectify this problem, compensate the real victims of its failed policy: the Indian people who hold small fractionated interests. The court of appeals correctly found that "by its plain terms . . . section 2206 does not provide for compensation to the

estate of the decedents for land it declares to escheat." (J.S. 17a.)

It is clear under the 1984 amendments to the escheat provision that individual Sioux now have the option of consolidating their fractionated interests in their family. It is now possible for an individual Sioux to devise an interest, otherwise escheatable, to any other owner of an undivided fractional interest in the tract of trust land. This would be in addition to the remedies suggested by the government under the original version: buying up other fractionated interests during his lifetime to increase his ownership percentage in the tract, partitionment and selling his fractionated interest during his lifetime to increase another's percentage in the tract. However, to the extent an individual does not want to consolidate his holdings in his family by devise, acquisition, partitionment or sale, the amended escheat provision still operates to extinguish his property interests without just compensation. The court of appeals recognized that this situation violates the Fifth Amendment because, again, it is "plain" by terms of the amended escheat provision that no compensation is to be paid to the decedents' estates.

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CONCLUSION

The Court is urged to affirm the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides in pertinent part:

> nor shall private property be taken for public use, without just compensation.

2. The Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 96 Stat. 2517, 25 U.S.C. 2201 *et seq.*, is reproduced in its entirety at J.S. App. 27a-31a, and the amendments to that Act made by Pub. L. No. 98-608, 98 Stat. 3171 *et seq.*, are reproduced at J.S. App. 32a-36a.

a. Section 207 of the Indian Land Consolidation Act, as originally enacted and as codified at 25 U.S.C. 2206, provides:

> No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descendant* by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

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*So in original. Probably should be "descend."

b. Section 207 of the Indian Land Consolidation Act, as amended by the Act of Oct. 30, 1984, Pub. L. No. 98-608, § 1(4), 98 Stat. 3172, and as codified at 25 U.S.C. (Supp. II) 2206, provides:

> (a) No undivided interest in any tract of trust or restricted land within a tribe's reserva-

tion or otherwise subject to a tribe's jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death. Where the fractional interest has earned to its owner less than $100 in any one of the five years before the decendent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.

(b) Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.

(c) Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatble interests.

3. Section 11 of the Act of Mar. 2, 1889, ch. 405, 25 Stat. 891, provides:

That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allot-

ments shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patents to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, and patents shall issue accordingly. And each and every allottee under this act shall be entitled to all the rights and privileges and be subject to all the provisions of section six of the act approved February eighth, eighteen hundred and eighty-seven, entitled "an Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians and for other purposes." *Provided*, That the President of the United States may in any case, in his discretion, extend the period by a term not exceeding ten years; and if any lease or conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such lease or conveyance or contract shall be absolutely null and void: *Provided further*, That the law of descent and partition in force in the State or Territory where the lands may be situated shall apply thereto after patents therefor have been executed and delivered. Each of the patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto.

4. Section 28 of the Act of March 2, 1889, ch. 405, 25 Stat. 899, provides:

> That this act shall take effect, only, upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in

manner and form prescribed by the twelfth article of the treaty between the United States and said Sioux Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, which said acceptance and consent, shall be made known by proclamation by the President of the United States, upon satisfactory proof presented to him, that the same has been obtained in the manner and form required, by said twelfth article of said treaty; which proof shall be presented to him within one year from the passage of this act: and upon failure of such proof and proclamation this act becomes of no effect and null and void.

5. Article 12 of Treaty of Fort Laramie, April 29, 1868, 15 Stat. 635, provides:

> No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article 6 of this treaty.